SUPREME COURT, U. S.
MAY 8 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. ~~1373~~ 145

LEO GEORGE BECKER
and
JAMES JUDE TAGLIA,
Petitioners,

v.

PHILCO CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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To the Honorable Earl Warren, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your Petitioners, Leo George Becker and James Jude Taglia, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the consolidated cases of Leo George Becker v. Philco Corporation and James Jude Taglia v. Philco Corporation on February 6, 1967.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit (*infra*, Appendix A) is reported at 372 F.2d 771. The opinion of the United States District Court, Northern District, Virginia (*infra*, Appendix B) in granting Respondent's Motion for Summary Judgment is reported at 234 F. Supp. 10.

JURISDICTION

The judgment of the Court of Appeals affirming the Orders of the United States District Court, granting Respondent's Motions for Summary Judgment was entered on February 6, 1967. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

Is a government contractor endowed with the attributes of a Federal Agency and is it and are its employees clothed with unqualified or absolute privilege to falsely and maliciously defame other employees in reporting a loss, compromise, or suspected compromise of classified information, solely by reason of (1) having contracted with the United States Government to furnish it with supplies or services which are required and necessary to the National Defense, and (2) in connection therewith having entered into a security agreement with the United States government under the terms of which it has agreed to report the *loss, compromise,* or *suspected compromise* of classified information.

REGULATIONS INVOLVED

Under the terms of the Security Agreement involved (R III, Appendix C, *infra*) Respondent agreed to comply with the applicable provisions of the Department of Defense Industrial Security Manual for Safeguarding Classified Information. The Manual in effect at all times here pertinent, was issued, insofar as its provisions rel-

evant to issues here presented are concerned, pursuant to the provisions of Executive Order No. 10865, February 20, 1960, 25 F.R. 1583, as amended by Executive Order No. 10909 of January 17, 1961. 26 F.R. 508. The relevant provisions of Executive Order No. 10865 are:

> "Section 1.(a) The . . . Secretary of Defense, . . . shall, by regulation prescribe such specific requirements, restrictions, and other safeguards as they consider necessary to protect (1) releases of classified information to or within United States industry that relate to bidding on, or the negotiation, award, performance, or termination of contracts with their respective agencies, and (2) other releases of classified information to or within industry that such agencies have responsibility for safeguarding. So far as possible, regulations prescribed by them under the Orders shall be uniform and provide for full cooperation among the agencies concerned."

In relevant part the Manual, dated 21 September 1956, Revised 31 December 1962, stated:

> "6. Reports
>
> The contractor shall submit immediately to the cognizant security officer —
>
> (a) . . .
>
> (b) A report, classified if appropriate, of any loss, compromise or suspected compromise of classified information.
>
> * * *
>
> "14. Loss, Compromise or Suspected Compromise of Classified Information
>
> (a) . . .
>
> (b) . . .
>
> (c) . . .
>
> (d) In the event of loss, compromise, or suspected compromise of classified information outside of a facility the contractor shall establish procedures requiring that the person discovering

the loss, compromise or suspected compromise shall immediately —

(1) Notify the local office of the Federal Bureau of Investigation and furnish sufficient information to assist in identification of the information (if the loss, compromise or suspected compromise occurs outside the United States, the nearest United States authorities shall be notified in lieu of the Federal Bureau of Investigation); and

(2) Report the loss to the contractor by the fastest means of communication.

(e) The military department assigned security cognizance shall conduct such further inquiry as may be required." There are no statutes involved.

STATEMENT OF THE CASE

Petitioners were employees of Respondent, a Defense Contractor, prior to and during the early part of 1962. Respondent had also entered into a Security Agreement with the United States. (RIII, Appendix C, *infra*). Petitioners, as employees of Respondent, had been granted access authorizations (Security Clearances) to classified information; a *sine qua non* of the exercise of their responsibilities as employees of Respondent. In June of 1962, a disgruntled, discharged female employee of Respondent by the name of Patricia Poole, wrote a "poison pen" letter to Respondent alleging that Petitioners had breached Industrial Security Regulations as set forth in the Industrial Security Manual, *supra*, in the handling of two documents, allegedly classified "Secret". Petitioner Taglia was charged with having obtained, in an unauthorized manner, two Department of Defense documents marked Secret. As to one of these it was alleged that he cut the "Secret" from it; as to the other, that he handled it within the Company's offices in a manner contrary to the applicable regulations. Petitioner Becker, as manager of the Philco Corporation Office in which Petitioner

Taglia was employed, was charged with knowledge of and participation in these violations. As both Petitioners had Security Clearances, it could hardly be said that the documents were "compromised", even though the required steps for their protection were allegedly not taken. No evidence of compromise was ever adduced.

Upon receipt of this information, Respondent's Security Officer conducted an investigation of the reported circumstances, and reported his conclusions to a Vice President of the Respondent. This Vice President called Petitioners in for a discussion of the charges made by Poole, which Petitioner denied, at the conclusion of which Petitioners were led to believe they had been exonerated.[1] However, a report of the investigation was made, which did not include the poison pen letter (Petitioners have not to this day been able to see or obtain a copy of this letter), by a staff counsel for Respondent, which purported to be a finding that Petitioners were guilty of a breach of the Industrial Security Manual.

This report, after parts of it had been deleted, was informally delivered to the Department of Defense. Petitioners, and for that matter the Department of Defense, have never seen the deleted parts of the report. Nor has Respondent ever stated the reasons for this deletion, or what they consisted of. The part of the report delivered was defamatory in character, it accused the Petitioners of falsehood, and the manner and form in which it was presented was malicious. It was not a report of a loss, compromise, or suspected compromise of classified information, it was a report of an investigation and a finding of guilt.

As a result of this report, Petitioners' access authorizations (Security Clearances) were suspended, and they were discharged, as they were valueless to their employ-

[1] The District Judge stated in his decision (Appendix B) that Petitioners were accorded a full hearing by Respondent. This was not the case. It was more like a Kangaroo Court.

ers without Security Clearances. Petitioners sought and obtained a hearing before the Field Board (a single hearing officer) of the Access Authorization Review Board established by the Department of Defense pursuant to Executive Order No. 10865, February 20, 1961, 20 F.R. 1583, *supra,* as amended by Executive Order No. 10909. Copies of the Regulation setting up this Board and of the Executive Orders are reproduced at Page II of the Record. However, as that Board has no subpoena power or power to compel the testimony of witnesses, Petitioners were unable, as they have been to date, to examine the poison pen letter, to cross-examine Patricia Poole with references thereto, or to obtain the letter from Respondent, or to examine Respondent with reference to the deleted portions of the Report. The Respondent's employees who were witnesses and Patricia Poole refused to produce the documents and refused to answer questions concerning them. Nevertheless, on the basis of the report made by the "Field Board", a report which Petitioners have not been permitted to see, the Access Authorization Review Board permanently suspended their Security Clearances. Actions against the Secretary of Defense for a mandatory injunction requiring reinstatement of their Security Clearances have been instituted by Petitioners in the United States District Court for the District of Columbia and are pending there.

In the meantime Petitioners instituted separate actions for libel against Respondent in the United States District Court for the Eastern District of Virginia. Jurisdiction of that Court was based on the amount involved and diversity of citizenship. Title 28, U.S.C. § 1332 (a)(1). The District Court granted Respondent's Motions for Summary Judgment on the ground that the report was absolutely privileged.

Petitioners appealed to the United States Circuit Court of Appeals for the Fourth Circuit where the cases were consolidated. The Court of Appeals, in a single decision, affirmed the District Court.

ARGUMENT

The decision of the United States Court of Appeals for the Fourth Circuit, review of which is sought here, is based upon the following premises:

1. That by contract the Department of Defense of the United States, may delegate some of its functions to a private contractor, who thereby is endowed with the attributes of a Federal Agency; and

2. That executive heads of Federal Agencies, and their employees required to report internally, have an absolute privilege to defame or libel persons with whom they are concerned in the exercise of their duties.

Ergo, the Circuit Court concluded, Philco Corporation and its employees being required to report, have the same absolute privilege.

The Congress from time to time authorizes the Department of Defense to employ consultants and to employ contractors to supply "bodies" to perform a government function. A careful search of legislative enactments fails to disclose any statutory authority to delegate the responsibilities and authority of the Department of Defense to the extent that it may be charged therewith, over internal security. In *Greene v. McElroy,* 360 U.S. 474, 79 S. Ct. 1400, 3 L. Ed. 2d 1377, this Court reviewed the then existing regulations upon the basis of which Greene's Security Clearance had been issued and revoked. In that case this Court stated at 360 U.S. 506, 507:

> "If acquiescence or implied ratification were enough to show delegation of authority to take actions within the area of questionable constitutionality, we might agree with respondents that delegation had been shown here. In many circumstances, where the Government's freedom to act is clear, and the Congress or the President has provided general standards of action and has acquiesced in administrative interpretation, delegation may be inferred. Thus, even in the absence of specific delegation,

> we have no difficulty in finding, as we do, that the Department of Defense has been authorized to fashion and apply *an industrial clearance program which affords affected persons the safeguards of confrontation and cross-examination.* But this case does not present that situation. We deal here with substantial restraints on employment opportunities of numerous persons imposed in a manner which is in conflict with our long-accepted notions of fair procedures. * * *" (italics supplied)

The Executive Order absent in the *Greene* Case is present here. But it does not authorize the delegation of the internal security function to private contractors, and if it did, the question of the authority of the President to authorize such delegation would still be present.[2]

A careful search fails to disclose any decision by this Court on the question of the right to delegate a function of the Executive Branch of the Government to a private contractor. Similarly there does not appear to be a body of decisions concerning the status of a private contractor who has entered into a Congressionally authorized contract with the United States to supply services otherwise performed by Government employees. Does such a contractor take on the protective coloring of a Federal Agency?

It is suggested that the importance of this question, not only to the internal security program, but to the duties and obligations of defense contractors having Security Agreements with the Department of Defense, requires this Court's decision.

The subsidiary question is also one which is of great importance to the internal security program. Assuming, *arguendo,* that delegation of a part of the internal secur-

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[2] It should be noted that neither the Executive Order or the regulations confer, if they could, power to subpoena witnesses or to compel testimony. In this respect the fatal defects in the system found to exist in the Greene Case are still present.

ity program to private defense contractors is authorized, and that the result thereof is to make the private contractor a quasi-Federal Agency, then, and in that event, to what extent should its reports and those of its employees be considered absolutely privileged.

This Court in *Barr v. Matteo*, 360 U.S. 564, 79 S. Ct. 1335, 3 L. Ed. 2d 1454, conferred the absolute privilege upon the head of an executive department acting within the limits of his authority. In the dissenting opinion written by the Chief Justice, with whom Mr. Justice Douglas joined, in *Barr v. Matteo*, it was argued that officials below Cabinet or equivalent rank should have only a qualified privilege, as the reasons for absolute privilege did not exist at that level. Then in *New York Times v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686, this Court adopted a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves *actual malice;* that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

These decisions suggest that in according to the private contractor an absolute privilege in reporting the loss, compromise or suspected compromise of classified information, the Circuit Court ignored the trend of the decisions of this Court which it treated as analogous. Since the analogy is not clear, this Court, it is submitted, should grant Certiorari to consider and decide this question as well as the question of the validity of the creation of a quasi-Federal Agency by contract, and without Congressional authorization.

Respectfully submitted,

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